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BOOK REVIEWS

COLLECTED LEGAL PAPERS. By OLIVER WENDELL HOLMES. New York: HARCOURT, BRACE & HOWE. 1920. pp. vii, 316.

A man who for nearly forty years has held offices demanding frequent public speech and writing is a marked man, and ought to be a man of mark. Justice Holmes is both, and as with vigor unabated he contemplates a nearing eightieth birthday, he is so plainly the titular leader of a very polemic school of constitutional law that he can and does give an almost pontifical *imprimatur* to this book, describing himself in the preface as "an old warrior" to whom "the brilliant young soldiers" still give "a place in their councils of war".

These collected articles are interesting especially because they present the portrait of a man at once very modern and almost historic; they show, without the restraint of even a dissenting opinion, the lineaments of an historian and analyst of the law, of a legal teacher and philosopher, and of that judicial champion of *laissez faire* for voting majorities, who by the labors of his later years has become so familiar to the bar;—and not unknown to a rather uncomprehending laity.

Little in the book is new to one who has followed professional literature for a generation. Yet it redraws a character line to reprint from a review not always accessible the article (written before 1885) on Early Equity; and to learn from a later address how the writer deems it a natural feeling "that when you have the true historic dogma, you have the last word not only for the present but for the immediate future". This marks the scholar's taste for scholarship as a thing good in itself, and leads Justice Holmes to a humorous yet sympathetic reference to that Cambridge mathematician who recommended his own theorem by saying that the best of it was,—"It can never by any possibility be made of the slightest use to anybody for anything."

So too it rounds the lawyer side of the man to reproduce the inimitable essay on "Privilege, Malice and Intent" which for a quarter century has endured as sufficient proof of mastery in legal analysis. By that essay (if by nothing else) the writer proved by his work the faith he proclaimed in an earlier Harvard address that the "purpose of intellectual education is not the acquisition of facts, but learning how to make facts live".

But in the main, it is the gathering from quite diverse first printings, of some twenty essays and addresses that justifies the publication. These show, on occasions of some intellectual ease, in his "manner as he is", a man who first and foremost has never been driven to effort by anything but the urge of his own soul. He says, to be sure, that "the place for a man who is complete in all his powers is in the fight", but that is applause from the side lines; for almost every page reveals the interested but personally unaffected spectator of that struggle for pecuniary rewards which dominates most of the bar and the world.

Then too it is plain that by vocation or calling (in the old evangelical sense of the word) the Justice is a sceptic; indeed he practically proclaims it when he praises an enlightened scepticism even as to the worth of those rules of law which he himself has both exhumed from antiquity and deduced *ex rerum natura*.

And it is to material matters that he by preference devotes industry, ability, time and thought. He confesses that

"altruistic and cynically selfish talk seems to me about equally unreal. With all

humility I think 'Whatsoever thy hand findeth to do, do it with thy might' infinitely more important than the vain attempt to love one's neighbor as oneself . . . I believe that the greatest thing is a matter that comes directly home to us all. . . . More complex and intense intellectual efforts mean a fuller and richer life, they mean more life. Life is an end in itself, and the only question as to whether it is worth living, is whether you have enough of it".

Any man so compact of learning and observation, one who with equal facility can cite the Year Books and this week's destroyer of Herbert Spencer, is naturally fairly sure of himself; and the attentive reader of this book will from time to time find an assertion clinched by reference to a Massachusetts decision (per Holmes, *J.*); a process amusingly reminiscent of how frequently the decisions of that State (per Holmes, *J.*) have been of late years "cited with approval" in the Supreme Court of the United States.

It would be natural, too, for such a man to be a bit cynical, and he felt called upon many years ago to "take it for granted that no hearer of mine will misinterpret what I have to say as the language of cynicism." And indeed no man can read these intimate addresses, made at legal or academic functions, without feeling that Justice Holmes wholly lacks that dog-like snarl suggested by the word cynic; but he has a certain good-nature tolerance of coadjutors. While still in the Massachusetts Court, he said that "Judges commonly are elderly men and are more likely to hate at sight any analysis to which they are not accustomed and which disturbs repose of mind, than to fall in love with novelities"; and after he had been a decade or so in the national Supreme Court (with every opportunity of observation) he remarked that "Judges are apt to be naïf, simple-minded men, and they need something of Mephistopheles." Here is the true faith of the man, consistently illustrated by these products of his pen, for it has been Justice Holmes' duty and amusement, his pleasure and a cult, to play the part of Mephistopheles to his brother Judges; and for such efforts the Supreme Court of the country has afforded an unrivaled stage.

As for the law, it is of course a delight to exhaust antiquity and analyze leading cases; but for practical purposes "the prophecies of what the courts will do in fact, and nothing more pretentious are what I mean by the law." And when it comes to judicially fulfilling such prophecies in the manner continually recommended throughout the book, it is most interesting to observe the mental attitude of many recent opinions reflected in the talk and writing of thirty-five years. Thus "Whenever a doubtful case arises with certain analogies on one side and other analogies on the other, what is really before us is a conflict between two social desires, each of which seeks to extend its dominion over the case, and which cannot both have their way." Again and again he points out that "Courts shun this view", for Judges do not like "to put a decision in terms upon their views as law-makers, [because] the moment you leave the path of merely logical deduction you lose the illusion of certainty which makes legal reasoning more like mathematics. But the certainty is only an illusion nevertheless." The Court must always face the social problem, for the "true science of the law does not consist" mainly in a "logical development, as in mathematics, or in a study of it as an anthropological document from the outside; an even more important part consists in the establishment of its postulates upon accurately measured social desires instead of tradition".

One must indeed pass from this collection of essays, to a long line of decisions to find out how "social desires" are to be "accurately measured"; but whatever the method, it is the duty of the bar and bench to do it; and these essays and addresses prove at least what an extremely enjoyable time Mr. Justice Holmes has had for nearly forty years in criticising efforts at fulfilment.

For over a generation he has most ably fulfilled this function of criticism;

yet has found that "the rudiments need eternal repetition". Eternal repetition is necessary because, as the Justice regretfully admits, it has happened that "a gentleman prominent at the bar of one of the States professed difficulty in understanding what I mean".

Summa of the rudiments seems to be that "to rest upon a formula is a slumber that, prolonged, means death"; and our system of morality (out of which law grows or in which it is planted) is "a body of imperfect social generalizations expressed in terms of emotion. To get at its truth it is useful to omit the emotion and ask ourselves what those generalizations are and how far they are confirmed by fact accurately ascertained". Whether emotion itself be not a fact also demanding accurate ascertainment, is perhaps the one exegetical point not covered in some one of these papers.

The book is delightful to any man of legal training; and if such a man, especially one reasonably familiar with the course of Supreme Court decisions for the last eighteen years or so, will read it, he will discover how influential can become the "endless repetitions" of a man of great natural parts, learned and loving learning, worldly and sceptical, a little weary of observing that "*sermo datur cunctis, animi sapientia paucis*", and at times inclined to substitute *mihi* for *paucis*,—but always and everywhere perfectly disinterested and of a high and undaunted soul.

CHARLES MERRILL HOUGH

HANDBOOK OF ADMIRALTY LAW. SECOND EDITION. By ROBERT M. HUGHES, of the Norfolk Admiralty Bar. St. Paul, Minn.: WEST PUBLISHING CO. 1920. pp. xviii, 572.

Since the publication of the first edition of this work in 1901, there has been no volume dealing with the whole subject of Admiralty Law. The changes which various statutes have made in the maritime law have so revolutionized it as to render the former edition obsolete in many respects. Among these changes may be noted particularly the radical alteration in the law of maritime liens on domestic vessels by the Act of June 23, 1910.

The author of this treatise is a well known admiralty practitioner and was at one time a lecturer on Admiralty Law in Washington and Lee University. The subject is, therefore, approached by the writer from a practical, as well as a theoretical, view-point, which will make the volume useful both as a reference book for law offices and as a text for use in the law schools. The publication of a second edition of this book is timely because, while recent books have been published dealing with particular branches of the law, such as Charter Parties and General Average, there was heretofore no modern treatise on Admiralty Law as a whole.

As to the general scheme of the volume, it seems rather unfortunate that the author did not include in an earlier chapter the brief resumé on admiralty practice. This is especially so in case the book is intended to be read consecutively since, unless the reader has at the outset, a clear knowledge of rights *in rem* and *in personam*, a clear understanding of the law relating to such subjects as maritime liens and pilotage cannot be acquired.

There are some unfortunate errors in the use of English which detract from the character of the volume. Such phrases as "It would be difficult to find a transaction more maritime in character than the duties of a pilot" (p. 40), "Illustrations of such interests would be an innocent purchaser for value or a subsequent supply claim" (p. 105), "Transactions more thoroughly marine in nature than the relations of ship and cargo could hardly be imagined" (p. 157), might well have been avoided by a careful reading of the text.